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Supreme Court, U.S.
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No. 16-6316

IN THE SUPREME COURT OF THE UNITED STATES

November 2, 2016

MICHAEL DAMON RIPPO, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

1. Whether a procedurally defaulted state habeas claim of judicial bias presents a federal question.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

After a jury trial in 1996, Rippo was convicted of two counts of First Degree Murder and was sentenced to death for choking and killing two women. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997) . The Nevada Supreme Court affirmed on direct appeal and issued Remittitur on November 3, 1998. Id. Rippo filed a timely first state habeas petition on December 4, 1998, and post-conviction counsel was appointed. After supplemental briefing and an evidentiary hearing, the petition was denied with written findings filed on December 1, 2004. The Nevada Supreme Court again affirmed on appeal and Remittitur issued on January 19, 2007. Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006). After pursuing federal habeas, Rippo returned to state court to exhaust claims by filing a successive state habeas petition

on January 15, 2008. The claims were all procedurally defaulted and written findings dismissing the petition were filed on March 11, 2009. The Nevada Supreme Court affirmed in a published opinion finding that Rippo had failed to show good cause and actual prejudice or actual innocence sufficient to overcome the procedural default under state law. Rippo v. State, 132 Nev. ___, 368 P.3d 729 (2016). Rippo now petitions this Court for certiorari.

REASONS FOR DENYING THE PETITION

I.
APPLICATION OF STATE HABEAS PROCEDURAL BARS CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND

Application of state procedural bars is an adequate and independent state ground which will bar this Court's review of the judicial bias claim. As set forth in the Statement of the Case section above, Rippo is seeking certiorari review not of a direct appeal from a state conviction, but from the Nevada Supreme Court's affirmance of the denial of his untimely and successive state post-conviction petition which was procedurally barred under state law. It is well established that the Supreme Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546 (1991); Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877 (2002). This rule applies whether the state law ground is substantive or procedural. Id. The adequate state ground doctrine applies to bar federal review when the state

court declines to address an inmate's federal claims because the inmate had failed to meet state procedural requirements. Id.

In Nevada, "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the supreme court issues its remittitur." NRS 34.726; see also Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(2). The Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for the petitioner's failure to present the claim or for presenting the claim again and actual prejudice to the petitioner. NRS 34.810(3). Even if Rippo could establish good cause, he must also demonstrate actual prejudice, which requires a showing,

"not merely that the errors created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the [trial] with error of constitutional dimensions." See NRS 34.726(1); NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

Although Rippo attempts to frame a constitutional issue for this Court's review, the Nevada Supreme Court did not actually reach the merits of any federal question and instead affirmed dismissal of Rippo's untimely and successive petition based on state procedural grounds:

> [W]e conclude that although Rippo filed his petition within a reasonable time after the postconviction-counsel claims became available, those claims lack merit and therefore he has not demonstrated good cause for an untimely petition or good cause and prejudice for a second petition. We also reject his other allegations of good cause and prejudice. The district court properly denied the petition as procedurally barred. We therefore affirm.

Rippo v. State, 368 P.3d at 734. Accordingly, the Nevada Supreme Court's decision rests squarely upon the application of state procedural bars which are independent of any federal question and adequate to support the judgment.

NO FEDERAL QUESTION WAS DECIDED BELOW

It is essential to the jurisdiction of the Supreme Court under § 1257(a) that a substantial federal question has been properly raised and decided in the state court proceedings. Mu'Min v. Virginia, 500 U.S. 415, 422, 111 S.Ct. 1899, 1903 (1991) (holding that the Court's appellate jurisdiction under § 1257(a) is limited "to

enforcing the commands of the United States Constitution"); Leathe v. Thomas, 207 U.S. 93, 98, 28 S.Ct. 30, 31 (1908) ("[I]n a case coming from a state court this court can consider only Federal questions, and . . . it cannot entertain the case unless the decision was against the plaintiff in error upon those questions."). Consequently this Court's appellate jurisdiction over state court decisions is limited to "correct[ing] them to the extent that they incorrectly adjudge federal rights." Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463 (1945). Where federal law is not binding, and thus the state court could render the same judgment on remand even after this Court "corrected its views of federal laws," this Court's review would amount to nothing more than an advisory opinion. Id.

Rippo argues that certiorari is necessary to review his claim of a federal Due Process violation arising from judicial bias of the trial judge at his capital jury trial 20 years ago. This claim was in fact raised on direct appeal in 1997 and was denied on the merits by the Nevada Supreme Court. Rippo v. State, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). At that time, this Court declined to review the judicial bias issue on the merits when it denied certiorari. Rippo v. Nevada, 525 U.S. 841, 119 S. Ct. 104 (1998). Significantly, the judicial bias claim was not re-asserted in the first state postconviction proceedings even though new information had come to light. See e.g., Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006); Rippo v. State, 368 P.3d at 745 ("The new information is based on documents filed

in connection with and testimony at the federal trials in 1997 and 1998, after Rippo's trial.").[1] Not until a decade later in 2008 did federal counsel raise this "new" evidence in a successive state exhaustion petition. Now, this judicial bias claim comes again before the Court not on the merits, but in the context of a successive and procedurally barred state habeas petition for which no good cause was shown.

The recent decision of the Nevada Supreme Court did not actually reach the merits of any federal question but instead affirmed dismissal of the judicial bias claim based on state procedural grounds:

> Rippo also has not demonstrated good cause and actual prejudice to excuse his failure to re-raise the judicial-bias claim in the first habeas petition. . . . Therefore, the postconviction-counsel claim lacks merit and is not adequate cause to excuse the procedural default of the judicial-bias claim under NRS 34.810(2).

Rippo v. State, 368 P.3d at 745. In other words, under state law the Nevada Supreme Court could not reconsider the judicial bias claim on the merits in a second habeas petition unless Rippo first showed good cause for first postconviction counsel's failure to re-raise the claim in that proceeding. Under Nevada law, ineffective assistance of postconviction counsel may excuse a procedural default for failing to raise a claim in a prior habeas proceeding, but only if the ineffective assistance of postconviction counsel claim itself is not procedurally barred. Id. at 737.

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[1] Rippo's trial judge was ultimately acquitted of all charges in his federal corruption case.

Rippo relies upon Foster v. Chatman where this Court found it had jurisdiction to grant certiorari on a claim of a Batson violation occurring at trial that had been renewed in state habeas and denied based on res judicata. Foster v. Chatman, ___ U.S. ___, 136 S. Ct. 1737 (2016). Significantly, the Georgia Supreme Court's order declining the appeal provided no reasoning for its decision, which left open the question of whether the order rested on an adequate and independent state law ground so as to preclude jurisdiction. Id. This Court found it was apparent that the state habeas court's application of res judicata to Foster's Batson claim, consisting of four pages of federal Batson analysis on the merits, was not independent of the merits of his federal constitutional challenge, and therefore posed no impediment to review. Id. Ultimately, the state habeas court had concluded that Foster's "renewed Batson claim is without merit." Id.

No such ruling on the merits of the renewed judicial bias claim occurred in the present case. Unlike the Georgia Supreme Court in Foster, the Nevada Supreme Court articulated multiple state law procedural rules as the basis for the habeas court's decision:

> Rippo acknowledged that the petition was not filed within the time period provided by NRS 34.726(1) and that most of the grounds in the petition were either waived, successive, or an abuse of the writ and therefore subject to various procedural defaults under NRS 34.810. He provided several explanations for his failure to file the petition within the time provided by NRS 34.726(1) and for failing to raise the new claims in prior proceedings or raising the claims again. The district

> court dismissed the petition as procedurally defaulted, specifically mentioning NRS 34.716 and NRS 34.810(2).

Rippo, 368 P.3d at 735. Instead, the only claim reviewed "on the merits" was the claim of ineffective assistance of postconviction counsel which Rippo had offered as good cause to overcome the procedural default for his untimely and successive petition. Notably, there is no recognized federal constitutional right to effective assistance of state postconviction counsel. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991); Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987). Such a claim is purely a matter of state law. Nevada is not even obligated to apply Strickland analysis in its review of a claim of good cause based on postconviction counsel's errors.

Rippo claims that the Nevada Supreme Court's finding that Rippo suffered no prejudice from first postconviction counsel's performance was based on its antecedent holding that the judicial bias claim was without merit. Even if it is true that the consideration of prejudice necessitated some review of the merits of the claim, lack of good cause or deficient performance remain unaffected and are an adequate basis alone to deny relief under state procedural bars. Prejudice by itself is insufficient as "both showings must be made . . . ." Rippo, 368 P.3d at 741. The Nevada Supreme Court's prejudice analysis depended upon a string of hypotheticals and antecedents which demonstrate the independent and adequate state law grounds Rippo would have had to overcome to have the judicial bias claim entertained again.

The Court held that in order for it to revisit the issue, Rippo would have had to establish good cause such as ineffective assistance of postconviction counsel based on deficient performance for failing to raise the judicial bias claim for a second time after it was denied on direct appeal and at the same time overcome Nevada's law of the case doctrine. But none of these conditions were met.

To the extent Nevada's discussion of the judicial bias claim in any way could be construed as a ruling on the merits, such is at most an alternative and unnecessary ruling in light of the primary holding of the case that Rippo had failed to establish good cause and deficient performance of first postconviction counsel to overcome the state procedural default. Sochor v. Florida, 504 U.S. 527, 534 n.*, 112 S.Ct. 2114, 2120, n.* (1992) (state supreme court made requisite "plain statement that petitioner's claim was procedurally barred" by stating that "claim was not preserved for appeal" and by citing case requiring preservation of claims, even though state court went on to reject merits "in the alternative"); Bailey v. Nagle, 172 F.3d 1299, 1304 (11th Cir. 1999) (although state court opinion "could have been more explicit" about its reasoning, ruling rested on procedural ground and analysis of merits was merely alternative ground for decision). Should this Court seek to correct any perceived federal holding in this case, it would amount to nothing more than an advisory opinion because the state judgment would remain that Rippo had failed to demonstrate good cause under state law. Herb v. Pitcairn, 324 U.S. 117, 125, 65

S.Ct. 459, 462-63 (1945). The merits of any judicial bias issue, even if constituting structural error, would still be procedurally defaulted under state law.

Similarly, Cone v. Bell is inapposite as it simply holds that a when a state court declines to review the merits of a petitioner's claim solely on the ground that it has done so already, it creates no bar to federal habeas review. Cone v. Bell, 556 U.S. 449, 466-67, 129 S.Ct. 1769, 1781 (2009); see also Wellons v. Hall, 558 U.S. 220, 130 S. Ct. 727 (2010). The Tennessee postconviction court had not invoked any kind of state procedural bar, but had simply declined to review again the same Brady claim that had been addressed on direct appeal. Id. "When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted." Cone v. Bell, 556 U.S. 449, 467 (2009). While Nevada relied in part on the law of the case doctrine to affirm the denial of Rippo's judicial bias claim, unlike Tennesee, Nevada also expressly denied relief based on three independent state procedural bars in NRS 34.726, NRS 34.810(1)(b), and NRS 34.810(2), any one of which alone would have been adequate.

Both Cone and Wellens arose from the denial of discovery and an evidentiary hearing in federal habeas proceedings, not state habeas proceedings. In Rippo's case, no federal habeas court has yet determined whether Rippo's judicial bias claim is barred from federal habeas review, and thus any claim under Cone and Wellens is

premature. It remains to be seen whether in federal habeas Rippo will be permitted the factual development of his claim which he procedurally defaulted in state court. Such issue is not ripe at this time.

In the alternative, Rippo seeks a remand for further state proceedings in light of this Court's recent decision in Williams v. Pennsylvania, ___ U.S. ___, 136 S.Ct. 1899 (2016). However, Williams is distinguished because it involved a claim of judicial bias in the immediate state court postconviction order under review, not a procedurally defaulted claim of judicial bias from trial. This Court in Williams did not need to concern itself with questions of jurisdiction and an adequate and independent state bar. Certiorari was granted because the former district attorney who had authorized seeking the death penalty against Williams, subsequently sat as an appellate judge in this same case and declined to recuse himself. Id. This Due Process violation occurred in the current postconviction order for which certiorari was sought. Rippo makes no such claim against the justices of the Nevada Supreme Court in affirming the denial of his procedurally barred habeas petition.

A GVR is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome" of the matter. Wellons v. Hall, 558 U.S. 220, 225, 130 S. Ct. 727, 731 (2010). The decision

in Williams to apply the Due Process clause to the situation of a former prosecutor acting as a judge in the same case, has no bearing on the question of judicial bias in Rippo's case. To the extent Williams announced a new rule of law, Rippo has failed to show that it has retroactive application to his final judgment on collateral review. Even if it does, Williams does not undermine the conclusion in Bracy that for a Due Process violation a petitioner must show actual judicial bias "in his own case." Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793 (1997). Rippo has no evidence that his trial judge was being criminally investigated by the prosecution during his trial. The district attorney's investigation began only after the federal Indictment against the trial judge was unsealed, about a month after the conclusion of Rippo's trial. None of this ultimately matters because irrespective of prejudice, Rippo was unable to show good cause for the delay and for re-raising the judicial bias issue in a successive state habeas petition.

It has become the settled practice of this Court that, in the exercise of its §1257(a) appellate jurisdiction over state courts, it will not consider federal questions not pressed or passed upon in the state courts. This requirement stems from "the appropriate relationship of this Court to state courts," a relationship of "peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review." McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434

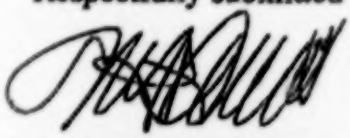
(1940). Because no federal question was fairly decided below as to judicial bias, this Court is without jurisdiction to entertain such in a petition for certiorari review.

CONCLUSION

In the Opinion at issue in this Petition, the Nevada Supreme Court did not rule upon the merits of any federal question regarding judicial bias. Such issue simply is not presented due to the procedural posture of this case. Rather, the Nevada Supreme Court found that Rippo's successive and untimely post-conviction petition was procedurally barred and Rippo had failed to establish a good cause explanation for his delay and failure to re-raise the claim in his previous first state post-conviction petition. No federal constitutional issue was involved at all in the application of state procedural bars which constitute an independent and adequate state ground barring federal review.

WHEREFORE, the State respectfully requests that certiorari be denied.

Respectfully submitted



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CERTIFICATE OF SERVICE

I, Steven S. Owens, a member of the Bar of this Court, hereby certify that on November 2, 2016, one copy of Respondent's Brief in Opposition to Petition for the Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid.

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I further certify that all parties required to be served have been served.

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November 2, 2016

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RE: Michael Damon Rippo
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The State of Nevada
No. 16-6316

Dear Clerk:

We are enclosing the original and eleven copies of our Respondent's Brief in Opposition of Petition for Writ of Certiorari and the Original Certificate of Service in the above-captioned matter for filing in your office and consideration by the Court.

Very truly yours,

BY _____
STEVEN S. OWENS
Nevada Bar #004352
Chief Deputy District Attorney

SSO/ed

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